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(3)

No. 09-793

FEB 11 2010

In The
Supreme Court of the United States

CHERYL JANKY,

Petitioner,

v.

LAKE COUNTY CONVENTION AND VISITORS BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY

The Petitioner prevailed in the lower court as being the copyright owner. The Respondent secured a reversal based on material misrepresentations of the law and facts. The Respondent's Brief in Opposition (Opposition) illustrates additional support for Petitioner's Writ of Certiorari for review of the issue of joint authorship as provided by *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994). Particularly, when Farag represented several times at his deposition and at trial that he and Respondent are partners and have a 20 year friendship. [App. II, pp. 4a, 5a, 6a, 11a] Farag did not express any "intent" to be a joint author nor did he provide any independent copyrightable parts to be merged with Petitioner's song. [App. pp. 5a and 57a] Respondent merely translated ideas to Farag, who was the **"hired"** runner [App. II, pp. 3a, 5a, 11a] to get Janky's song for Respondent from Petitioner, copyright owner unbeknownst to Janky, the owner.

The Respondent LCCVB paid the hired Farag **$15,000** for his services to secure Janky's music composition [App. II, p. 1a, 2a, 3a, 5a] plus promotional marketing support of $20,000 plus to benefit Farag and Respondent to secure Janky's music and lyrics. Farag's **"hired"** and employed [App. II, pp. 5a, 11a] by Respondent did not constitute a joint authorship with the Petitioner. The Court of Appeals reversed the District Court's decision and erred, creating conflict among the majority court circuits. The Respondent and Farag's first scheme was to induce Petitioner to create for Respondent the tourism song under the guise of entering into a songwriting contest. The Respondent and Farag carried out a plan to launch Petitioner's copyrighted "Wonders of

Indiana" song once delivered to Respondent without her authorization, to place the music on phone lines, sell records, market her song in movie theaters to benefit Respondent and Farag. [App. p. 64a] Petitioner was defrauded out of her copyright plus money based on the pretext that Petitioner was entering a song contest to lawfully help Respondent. Petitioner filed a suit against the infringers, Respondent and Farag, who was **hired** by Respondent [App. II, p. 11a] and the alleged joint author. Then Farag filed a counter lawsuit against Petitioner for $1,000,000, alleging that the copyright registration with his name on it was a forgery, disavowing any interest in the song. The Court of Appeals, however, overlooked the record, void of Farag's intent. [App. pp. 15a, 41a, 42a and 59a]

The Opposition failed to cite one case to support the Court of Appeals' conflicting decision with the majority circuits. In their 37 page Opposition Brief, Farag failed to establish intent and joint authorship.

The Opposition seeks to cloud the facts. The District Court Judge Cherry and the Court of Appeals' dissenting Judge Ripple easily discerned that there was ***"no intent"*** to create a joint authorship between Farag and the Petitioner, Cheryl Janky. [App. pp. 15a, 58a, 59a, 61a and 63a] ***Moreover, the record is void of any intent [App. p. 63a] and the few ideas offered by Batistatos were not copyrightable as noted by the District Court and the Court of Appeals' dissent by Hon. Ripple and under any of the cases cited by Respondent, notably Erickson v. Trinity, 13 F.3d 1061 (7th Cir. 1994)*** [App. II, pp. 3a, 5a, 8a, 9a] Petitioner's Writ for Certiorari is necessitated by the circumstances that the request impacts the creativity of Americans globally.

Petitioner's writ for review will protect all creative persons' and institutions' copyright interests internationally and globally beyond Respondent's self-serving interest. A travesty occurs when a third party such as Respondent advocates for its own benefit to use Petitioner's song based on underhanded methods in **hiring** the band leader Farag as a conduit/liaison of ideas [App. II, pp. 11a, Pet. Writ 13-14] to be the joint author owner when there is no contribution from the liaison party. The Court of Appeals' reversal decision here for Respondent can destroy commerce and eviscerate the current case laws, circuits and statutes. In absence of intent, argued by Respondent, a person who collaborates knowingly or unknowingly could use the internet system that conveys ideas, transmit suggestions ***as a provider source such as aol.com or yahoo.com can become a joint author of a party's work when one advocates such erroneous factual and legal grounds as Respondent that intent or copyrightable parts are not significant elements***. Respondent's posture is meritless to characterize Farag as the joint author without any contribution on the record except he was a go between for the Respondent to talk to the Petitioner. [App. pp. 47a, 51a, 54a-63a, App. II, pp. 8a, 9a, 11a, Pet. Writ, p. 8] The Petitioner's compelling case for Writ of Certiorari has overwhelming, positive and overreaching impact that affects a global concern to protect creative persons lawful rights than to leave them in a conflicting posture.

Petitioner submits that this case warrants review to confirm with clarity that ***"mutual intent is a requisite for copyrightable parts" that are to be merged together is the law of the majority circuits per Erickson to establish joint***

authorship and under the Copyright Act, 17 U.S.C. §101, §201, §202 and §204.

Respondent's counsel continued to misrepresent material facts and law before this court as to who revised the song [Pet. Writ, pp. 13-14][1] by concealing statements of Respondent's executive, Mr. Batistatos, stated unequivocally, "I alone suggested the few changes..." and gave them to Mr. Farag to offer to Ms. Janky for her consideration. [Pet. Writ, pp. 13-14, App. II, pp. 3a, 5a, 8a, 9a] Mr. Farag confirmed this statement and demonstrated that he did not intend to be a joint author and filed a lawsuit against Petitioner's registered copyright application. [App. pp. 15a, 41a, Pet. Writ, pp. 13-14] The Court of Appeals' split decision awarded Farag joint authorship based on material misstatements of law and falsehoods [App. pp. 1a-14a]

Petitioner Janky inadvertently inserted Farag's name on a copyright and corrected this incident. [App. p. 59a] Petitioner's motive was to give credit to Farag for his suggestions. [App. p. 59a] The District Court Judge Cherry took judicial notice of Petitioner's correction and saw there was no mutual intent under the majority circuits and *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994). [App. pp. 40a-72a] Also, there was no copyrightable parts, *Erickson,* Supra. The jury confirmed this and the Court of Appeals' dissent cited this error in the Appeals' decision. [App. p. 1a] Respondent's Brief in Opposition and mischaracterization of stating the facts and law

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[1] Petitioner's Writ of Certiorari by Cheryl Janky filed in this matter.

provides greater weight for compelling grounds for Petitioner's writ to be granted.

The Petitioner raised and framed Respondent's material misrepresentation of issues and law before the District Court and the Court of Appeals in Petitioner's brief. The Court of Appeals' three (3) member panel had two (2) of the judges to rely on the Respondent's material misstatement of facts that Farag *provided the intent to be the joint author for the* "song's suggested changes." The Appeal Court's two (2) members out of three (3) set aside the Janky decision. Petitioner's Writ, pages 13 and 14, supported by the court record below presented an accurate and truthful statement that intent is lacking.

The questions in establishing an intent are simple and the indisputable record shows the following:

(1) Did two (2) persons [Janky and Farag] agree to create a body of works? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. pp. 49a-63a, App. II, pp. 1a, 3a, 5a, 11a]

(2) Did the two persons [Janky and Farag] intend to form a joint authorship? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. p. 63a, App. II, p. 11a]

(3) Did Respondent's executive, Speros Batistatos, solicit the Petitioner to create a body of work for the Lake County Convention and Visitors Bureau by using Farag? ***Yes.*** [App. p. 47a, App. II, p. 11a]

(4) Who solely offered ides for changes to Petitioner's song? ***Speros Batistatos***. [Pet. Writ, pp. 13-14, App. II, pp. 1a, 3a, 5a, 11a]

(5) Did Farag state he made any changes to Petitioner's work? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [Pet. Writ, p. 14, App. p. 15a, App. II, pp. 8a, 9a, 11a]

(6) Was there any mutual intent to create a joint "Wonders of Indiana" song between Respondent and Petitioner or the translator, Farag, of the ideas? ***No.*** [App. p. 63a, App. II, pp. 3a, 5a, 11a]

(7) Who was the hired runner between the songwriter Janky and the Respondent's executive, Batistatos' song ideas to present to Janky? (a) ***Farag was the runner for Batistatos and Farag contributed zero (0) changes to the song.*** [Pet. Writ, p. 14]; (b) ***Batistatos offered his ideas and recommendations to the runner***. [App. II, p. 11a]

(8) Does a few words or ideas offered by Respondent constitute parts to be copyrightable parts? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. p. 63a] and the Copyright Act.

(9) Who filed a counterclaim against Petitioner disavowing any interest in Petitioner's copyrighted application? ***Farag.*** His acts are contrary to *Erickson v. Trinity*, supra, intent. [App. p. 15a]

(10) Who filed bankruptcy and did not list any interest in the Petitioner's copyrighted song at issue that was consistent with his testimony and Respondent's executive Batistatos that he did not contribute to the joint creation of the song? ***Henry Farag hired by Batistatos***. [App. II, p. 11a]

The District Court and the dissenting judge at the Court of Appeals found the court record void of any mutual intent. [App. p. 63a]

ARGUMENT

1. Respondent Compounded More Material Misrepresentation of Facts and Petitioner's Issues Were Raised in the District Court and the Court of Appeals Which Demonstrates the Need for Review.

Respondent's first material misstatement is in the Opposition Brief, on page 1, which states, "ultimately, Janky and Farag revised a work of Janky's entitled "Wonders of Indiana" to conform with LCCVB's requirements." Janky revised her own work in consideration of Farag's suggestion secured from Speros Batistatos. [Pet. Writ pp. 13-14, App. II, pp. 8a, 9a] ***The false premises advocated by Respondent demonstrated a repeated pattern in providing material misrepresentation of facts and law to the court and now the Supreme Court of the United States. Respondent's counsel has caused the conflicted split decision with the Court of Appeals in advocating the untruth.***

Respondent made another major material misstatement and mischaracterization on page 7 in its Opposition Brief. Farag "participated in the significant revisions of the song that was ultimately accepted by LCCVB, Respondent." Who made the revisions or suggestions? Batistatos made the changes and offered several ideas. [Pet. Writ, pp. 13, 14] Janky wrote the song under the pretext of a contest sham postured by **Respondent's**

partner, [App. p. 47a] Farag. Janky incorporated Batistatos' ideas, thinking they were Farag's. Batistatos stated he acted alone [Pet. Writ, pp. 13, 14, App. II, pp. 8a, 9a] and made the suggested idea word changes. This statement articulated by Batistatos showed there was never any mutual intent between Petitioner and Farag to create a joint authorship. *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994)

Farag testified and confirmed Respondent's CEO's changes. [App. pp. 1, 15, 16, App. II, pp. 8a, 9a] Based on Respondent's and Farag's concealed acts, the District Court, Janky and Petitioner's counsel were deceived to think that Farag offered the minored ideas for Petitioner's song until Farag and Batistatos presented their testimony in "trial" that Farag did not make one change and Batistatos offered the ideas for change. [App. II, pp. 3a, 5a, 8a, 9a] Then Petitioner recognized that Respondent's counsel had filed fraudulent pleadings throughout the court process [Pet. Writ, pp. 13, 14] The few words offered to revise Petitioner's song were provided by Batistatos. The truth came out when Farag and Batistatos' parties confirmed their role. [App. II, pp. 3a, 5a, 8a, 9a] Farag's make believe contest [App. p. 47a] was a theft and shell game scenario set up to take Cheryl Janky's song by unlawful means. Farag collaborated or conspired with Respondent's executive to perpetrate a contest scheme and did not write any words for Janky's song. The Court of Appeals erred in its ruling and the decision did not conform with the majority circuits and statutes, *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994), *Childress v. Taylor,* 945 F.3d 644 (7 Cir. 2004), 17 U.S.C. §101, §201, §204.

Another material misstatement in the Opposition Brief indicated that Farag's contribution to Janky's song is 10% and was significant. Farag's contribution to Petitioner's song is zero (0). It cannot be argued that Farag's contribution is greater than 10% that benefit Respondent only. Farag's contribution to the copyrighted song that Batistatos stated is zero (0). Batistatos alone revised the song. Notably, Farag and Petitioner all agree with Batistatos on this point that Farag contributed nothing in writing to Petitioner's song. The Court of Appeals overlooked several key admissions of Respondent's executive admissions and Farag's. [Petitioner's Writ, pp. 13, 14, App. II, pp. 8a, 9a]

CONCLUSION

Compelling errors in law and evidence exist in the court's record to grant Petitioner's Writ of Certiorari to provide uniformity within the circuits to protect the creative process among all copyright owners. The creative process will be hampered based on the Court of Appeals' decision whenever there is more than one person involved in the creative process. The Petitioner for Writ of Certiorari humbly requests review by this court to maintain uniformity among the circuits.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. PAUL D. BORMAN
CASE NO. 03-74021

[Dated June 22, 2004]

CHERYL JANKY,

Plaintiff,

vs

HENRY FARAG, STREET GOLD RECORDS and LAKE COUNTY CONVENTION and VISITORS BUREAU,

Defendants.

The deposition of HENRY FARAG, having been called as a witness by the Plaintiff, pursuant to Notice of Deposition, at the conference room of the Lake County Convention and Visitors Bureau, 7770 Corinne Drive, Hammond, Indiana, on Tuesday, June 22, 2004, and commencing at the hour of 12:00 p.m.

This deposition was reported by NANCY L. CEGLAREK, a duly authorized shorthand reporter and duly commissioned officer of the State of Indiana.

* * *

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up with the song about Lake County?

A. I told him I needed certain code words or specific phrases that he wanted incorporated into the song.

Q. Did you also tell him that you needed **$20,000.00?**

A. Well, after that. [Emphasis added]

Q. Okay. Then let's back up a little.

So other than the code words that you needed in order to develop this song for the bureau, what else did you tell him you needed?

A. In terms of . . .

Q. In terms of being able to actually produce the results that he wanted.

A. Well, originally I told him that he would have to pay for the studio time to do a demo.

Q. Do you recall how much you told him you needed?

A. I don't know if it was -- it seems to me it was about $500.00.

Q. And you were able to come up with a demo?

A. Yes.

Q. And did he like the demo?

A. He liked it but suggested lyrical changes that more directly reflect Lake County, Indiana.

* * *

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* * *

Q. Okay. So did he suggest what code words or what additional lyrics should be included?

A. Yes.

Q. And did you incorporate his suggestions into the song?

A. Yes. [Emphasis added]

Q. Now, were you aware, Mr. Farag, at the time that all of this negotiations, conversations, whatever was occurring between you and Spiros Bodastatos what he wanted to do with the song?

A. Yes.

Q. And what did he want to do with the song?

A. Use it as part of a program to enhance or help create a positive image of Lake County, Indiana.

* * *

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* * *

Mr. Farag, we were talking about things that occurred in the development of a relationship between you and Spiros Bodastatos and the bureau, do you recall?

A. Yes.

Q. Would you consider him a **partner?**

A. Yes.

Q. And did you memorialize the terms of the **partnership** with some type of agreement that was executed by both sides? Was there a signed contract in other words? [Emphasis added]

A. No.

Q. Did you appear before the board and get an agreement approved?

A. No.

Q. Were you told by Mr. Bodastatos that the agreement had been approved by the board?

A. I know that there were discussions. I don't know or can't recall what the actual discussions were about.

* * *

[p.13]

* * *

Q. As a matter of fact, did you do an interview with the newspaper called the Region in regards to the partnership between you and the bureau?

A. I may have, I don't recall.

Q. Say back in July maybe of 2000?

A. Refresh my memory.

Q. Did you -- do you recall telling the newspaper, the *Region*, back in July of 2000 that the tourism board okayed your *Doo-wop* album about Lake County?

A. I probably did.

Q. Do you recall telling them that you were **paid $15,000.00** for -- to sell 1,000 CDs and 500 audio cassettes of the up coming album, *Doo-It-Doo-Wop* by the artist Stormy Weather to the bureau? [Emphasis added]

A. Well, that was the case.

Q. Okay. And that album included the song "Lake County, Indiana"?

A. Yes.

* * *

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* * *

Q. Now you've indicated that you were in **partnership** with the bureau. What was the bureau supposed to receive in terms of consideration for its involvement with you as a partner? [Emphasis added]

A. Promotion of the song, "Lake County, Indiana."

Q. That was supposed to benefit them? Promoting your song, "Lake County, Indiana" was supposed to benefit the bureau?

A. The song was called, "Lake County, Indiana."

Q. Why was it called "Lake County, Indiana"?

A. That's what the tourism bureau wanted.

* * *

APPENDIX 2

EXCERPT TRANSCRIPT OF A TRIAL

IN THE MATTER OF:

HENRY FARAG

March 14, 2007

CAUSE NO.
3:05-CV-217-PRC

BOSS REPORTERS
(219) 769-9090
2115 W. 81st Avenue
Merrillville, Indiana 46410
BOSSREPORTERS@SBCGLOBAL.NET

* * *

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he was insistent that certain phrases and names of the Lake County area be in this song. So I started putting some of those phrases down and. Up till that point that's what I did. [Emphasis added]

Q. So would it be fair to say that Mr. Batistatos made some requests for things that should be included in the song and you took down notes on what he wanted to be mentioned in the song. And that was the extent of what you had done up to that point?

A. Yes.

Q. Did you make any contributions to the song that was on the cassette that Ms. Janky brought into the meeting?

A. **No.** [Emphasis added]

* * *

A. I listened to it. I thought it was a decent song. I said I would take it to Speros, see what he thought. And that's what happened.

Q. So essentially the cassette of the song that Ms. Janky

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brought to the meeting was taken to Mr. Batistatos for his consideration?

A. Either the tape itself or my memory of the song. But I believe it was both, the tape and my own memory of the song.

Q. How long after Ms. Janky brought the tape in to the meeting did you have a follow-up meeting so that Mr. Batistatos could listen to Ms. Janky's song?

A. It was probably a few days.

Q. So would it be safe to say it was within the same week that Ms. Janky provided it to you?

A. I believe so.

Q. You go to the meeting, correct, you go back to Mr. Batistatos's office?

A. Yes.

* * *

Q. What was Mr. Batistatos response, to the best of your recollection?

A. ***He thought it was a good song, too. But he was very insistent about certain phrases and words. And he even added some more at the meeting than he had before. That those be in it because the song that I presented him that Cheryl had written was essentially a song about the state Indiana and not Lake County, Indiana. And those things*** [Emphasis added]

* * *

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

Cause No. 3:05-CV-217-PRC

[Dated March 12, 2007]

CHERYL JANKY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LAKE COUNTY CONVENTION & VISITORS BUREAU,	)
	)
Defendant.	)
	)

EXCERPT TRANSCRIPT OF THE TESTIMONY OF SPEROS ANGELOS BATISTATOS
TRANSCRIPT OF A TRIAL
BEFORE THE HONORABLE PAUL CHERRY, UNITED STATES DISTRICT MAGISTRATE JUDGE, and a Jury, held on the 12th day of March, 2007.

* * *

[p.5]

* * *

Q. You're attended that Mr. Farag might be a friend of yours?

A. No, I'm not referring to that.

Q. Oh, I'm -- well, he's a friend of yours; is that right?

A. I would characterize Henry as someone I've known for the better part of 20 years, he's never had dinner in my home I've never loaned him my car, so how you define friend is up to you, ***I hired*** Henry for professional services with respect to this song. [Emphasis added]

* * *

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* * *

Q. Did Mr. Farag give you a license in writing?

A. Mr. Farag and I had a very clear understanding of what our business relationship was. And it was one that he was producing ***a work for hire***, he was to handle all of the hand us a finished product, he handed us a finished product, being someone that I've known for 20 years I understood our relationship. [Emphasis added]

Q. So you weren't supposed to pay for it?

A. We did pay for it.

* * *